APPENDIX

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1141

UNITED STATES OF AMERICA, PETITIONER

—v.—

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1975
CERTIORARI GRANTED MAY 27, 1975

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RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET
FIFTH CIRCUIT COURT OF APPEALS

No. 74-2495

DATE	PROCEEDINGS
1974	
5-30	Filed Notice of Appeal
6-4	Case Docketed
6-5	Filed Order of District Court Appointing Counsel
6-5	Filed Duplicate Notice of Appeal and Clerk's Statement of Docket Entries
6-5	Filed C.J.A. #20 Appointing Counsel
6-5	Filed District Court Stipulation for Consolidated Appeal
7-12	Filed Record on Appeal 2 vols. (Trans. 347 pgs.)
7-12	Filed Exhibits
8-14	Appellant's Brief due, ext. to 8/22/74 only
8-22	Filed Brief for Appellants
9-11	Appellee's Brief due, ext. to 9/23/74
9-24	Filed Brief for Appellee
12-5	Oral argument in New Orleans
1975	
1-9	Opinion rendered, reversed and remanded
1-28	C.J.A. #20 rec'd—Wilcox
1-28	C.J.A. #20 rec'd—Mann
1-31	Judgment as Mandate Issued to Clerk
1-31	Exhibits returned to Clerk—2 envl.

DATE	PROCEEDINGS
2-7	Filed Order of Supreme Court—Extending time for filing certiorari petition to 3/30/75 (2/3/75)
3-19	Filed Notice of Filing of Cert. Petition (3/10/75)
6-3	Filed Order of Supreme Court granting certiorari (5/27/75)
6-27	Preparing Proceedings on Certiorari (Original Record)

CRIMINAL DOCKET

U. S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CR-74-3-ATH

DATE	PROCEEDINGS
1974	
4-3	Filed Indictment and Vote of Grand Jury.
4-3	J. S. 2 Report prepared.
4-3	Issued Bench Warrant for defendants, DAVIS, BIRT and GADDIS.
4-5	Filed U. S. Magistrate's Report of Proceedings as to BILLY WAYNE DAVIS.
4-8	Filed U. S. Marshal's Return showing that GADDIS was arrested at Winder, Ga., on April 3, 1974.
4-8	Filed U. S. Marshal's Return showing that BIRT was arrested at Winder, Ga., on April 3, 1974, and committed to City Jail, Warner Robins, Ga., this same date.
5-3	Filed Motion for Additional Peremptory Challenges. (Birt)
5-3	Filed Motion for Discovery and Inspection. (Birt)
5-3	Filed Motion for Reduction of Bond. (Birt)
5-3	Filed Motion for Severance. (Birt)
5-3	Filed Motion for Discovery and Inspection. (Gaddis)
5-3	Filed Motion for Additional Peremptory Challenges. (Gaddis)
5-3	Filed Motion for Severance. (Gaddis)

DATE	PROCEEDINGS

5-6 Filed Answer to Motion of Defendants Billy Sunday Birt and Bobby Gene Gaddis for Additional Peremptory Challenges.

5-6 Received Government's Memorandum in Opposition to Motion for Discovery and Inspection filed by Defendant Billy Sunday Birt.

5-6 Received Government's Memorandum in Opposition to Motion for Discovery and Inspection Filed by Defendant Bobby Gene Gaddis.

5-6 Received Government's Memorandum in Opposition to Motions for Severance Filed by Defendants Billy Sunday Birt and Bobby Gene Gaddis.

5-7 Filed Motion to Reduce Bail of Bobby Gene Gaddis.

5-10 Filed Hearings on Pretrial Motions in Macon, Ga., at 2:00 P.M., on May 8, 1974.

5-13 First day of Jury trial.

5-14 Second day of Jury trial.

5-15 Third day of Jury trial.

*4-17 Entered Plea of Guilty to Ct. 2 as to DAVIS.

5-1 Entered Plea of Not Guilty as to BIRT.

5-1 Entered Plea of Not Guilty as to GADDIS.

5-15 Sentence

—BIRT—Cts. 4, 5, 6, 7, 8, 25 yrs. impr.; Cts. 1, 2, 20 yrs. impr.; Ct. 3, 10 yrs. impr.; all cts. to run conc. (WDO) CO Vo

—GADDIS—Cts. 4, 5, 6, 7, 8, 25 yrs. impr.; Cts. 1, 2, 20 yrs. impr.; Ct. 3, 10 yrs. impr.; all cts. to run conc. (WDO) Co

—Birt & Gaddis sentenced on May 15, 1974, entered on docket May 28, 1974.

DATE	PROCEEDINGS

5-16 Sentence

—DAVIS—Ct. 2, 20 yrs. impr.; may become eligible for parole at such time Board of Parole may determine under 18:4208(a)(2). (WDO) Sentenced 5-16-74—entered on ??——??

5-15 J. S. Report prepared as to BIRT and GADDIS.

5-16 J. S. Report prepared as to DAVIS.

5-30 Filed Notice of Appeal of Billy Sunday Birt.

5-30 Statement of Docket entries and Certified copy of Notice of Appeal mailed to CCA-5 for Billy Sunday Birt.

5-16 Filed Order for Dismissal to Cts. 1, 3, 4, 5, 6, 7, 8, as to DAVIS.

5-30 Filed Notice of Appeal of Bobby Gene Gaddis.

5-30 Filed Stipulation for Consolidated Appeal.

5-31 Statement of Docket Entries and Certified Copy of Notice of Appeal and Stipulation for Consolidated Appeal, mailed to CCA-5 for BOBBY GENE GADDIS.

6-26 Filed transcript of evidence.

7-10 Record on Appeal forwarded to CCA-5.

7-22 Filed U.S. Marshal's Return showing that Billy Sunday Birt was delivered to USP, Atlanta, Ga. on 6/10/74 and was removed on 6/13-74 to USP at Marion, Ill.

7-22 Filed U.S. Marshal's Return showing that Bobby Gene Gaddis was delivered on 6-10-74 to USP at Atlanta, Ga.

10-18 Filed Transcript of Sentencing of Billy Wayne Davis.

DATE	PROCEEDINGS
1975	
2-3	Filed Mandate of CCA-5 reversing Judgment of District Court.
2-4	Filed Order of the Court making the Judgment of CCA-5 the Judgment of the District Court.
2-13	Filed transcript of Arraignment held at 4:15 P.M., April 17, 1974, in Macon, Ga., Hon. Wilbur D. Owens, Jr., presiding.
2-7	Filed Order of the Court ordering the U.S. Marshal, MD-Ga hold Billy Wayne Davis in the Middle District of Georgia until further order of this court. WDO
4-22	Filed U.S. Marshal's Return showing that Billy Wayne Davis was delivered on February 18, 1975, to Warden, U.S.P. at Lv.Ks.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Criminal No. 74-3-ATH

Violation: 18 U.S.C. 2113(a)
18 U.S.C. 2113(c)
18 U.S.C. 2113(d)
18 U.S.C. 2

UNITED STATES OF AMERICA

v.

BILLY WAYNE DAVIS
BILLY SUNDAY BIRT
BOBBY GENE GADDIS

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, did enter the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to commit in such bank a felony affecting such bank, that is, the taking by force and violence and by intimidation and from the presence of employees of such bank, money belonging to and in the care, custody, control, management, and possession of the bank; all in violation of 18 U.S.C. 2113(a), and 18 U.S.C. 2.

COUNT TWO

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS,

BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money, belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation; all in violation of 18 U.S.C. 2113(a) and 18 U.S.C. 2.

COUNT THREE

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, unlawfully and knowingly did possess about Seven Thousand Four Hundred Forty-one Dollars ($7,441.00), which had been taken and carried away with intent to steal and purloin from the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were insured by the Federal Deposit Insurance Corporation at the time of such taking and carrying away, and the said BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, knew said money to have been so taken and carried away; all in violation of 18 U.S.C. 2113(c), and 18 USC 2.

COUNT FOUR

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Penny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of

which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one William Remo Cody and did put in jeopardy the life of the said William Remo Cody by means and use of a dangerous weapon, that is, a .30 caliber rifle; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT FIVE

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one William Remo Cody and did put in jeopardy the life of the said William Remo Cody by means and use of a dangerous weapon, that is, a .20 gauge shotgun; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT SIX

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank

of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one Zalia Smith and did put in jeopardy the life of the said Zalia Smith by means and use of a dangerous weapon, that is, a .38 caliber revolver; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT SEVEN

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money belonging to and in the care, custody, control, management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one Jenny Brooks and did put in jeopardy the life of the said Jenny Brooks by means and use of a dangerous weapon, that is, a .38 caliber revolver; all in violation of 18 U.S.C. 2113(d), and 18 U.S.C. 2.

COUNT EIGHT

On or about the 6th day of March, 1974, in the Middle District of Georgia, BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, by force and violence and by intimidation, did take from the person and presence of Zalia Smith and Jenny Brooks, about Seven Thousand Four Hundred and Forty-one Dollars ($7,441.00) in money beyonging to and in the care, custody, control,

management and possession of the National Bank of Walton County, Loganville, Georgia, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and BILLY WAYNE DAVIS, BILLY SUNDAY BIRT, and BOBBY GENE GADDIS, aided and abetted by each other, in committing the aforesaid offense, did assault one Faye Jackson and did put in jeopardy the life of the said Fay Jackson by means and use of a dangerous weapon, that is, a .45 caliber pistol; all in violation of 18 U.S.C. 2113(d) and 18 U.S.C. 2.

A TRUE BILL.

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Foreman of the Grand Jury

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Assistant United States Attorney

* * * *

EXCERPT FROM TRIAL COURT'S INSTRUCTIONS

Ladies and gentlemen, let's look at this indictment, and talk about the essential legal ingredients that you ladies and gentlemen must find to reach a verdict in this case. You will notice, ladies and gentlemen, that at the end of each of these counts—each count is a separate charge of a violation of a law. Each count stands separately on its own feet, you might say. You will notice at the end that there is a reference to certain laws of the United States numerically identified. For instance in Count 1 it says 18 USC 2113(a), and 18 USC 2. These are each laws of the United States as passed by Congress. You look in these red books called United States Code Annotated and you can find each of those laws, and I'm going to just tell you what those laws say.

18 USC 2, ladies and gentlemen, is the basis for the allegation in this indictment "aided and abetted by each other. In a case where two or more persons are charged with the commission of a crime, the guilt of one defendant may be established without proof that that defendant personally did every act constituting the offense charged. And the reason for that is that the law as cited states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." We use the term "principal" as the term of a main actor—principal with an "a-1" being the main thing. He's punishable as a participant in the crime.

Let's back up and go over that one more time. There are two categories of principal under this statute. First of all, it says whoever commits an offense against the United States is punishable as a principal. That is the person who actually does it—who is the active participant. He is punishable as the principal. And then it says there is another category of persons who are also punishable as principal—punishable the same as the person who is the active participant. And those are, "whoever aids, abets, counsels, commands, induces, or procures" the commission of that crime, are also guilty as a principal. In other words, everybody is in the same category is what this statute says—the one that goes or actively does it, and everybody who aids, abets, counsels, commands, induces, or procures the commission of a crime. The law looks at them equally.

And then the statute also says that whoever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal. So we have a further category of principal, and that is whoever willfully causes someone else to do an act which, if directly performed by him or by another would be an offense against the United States, is punishable as a principal.

In other words, every person who willfully participates in the commission of a crime may be found guilty of that offense.

In order to aid and abet another to commit a crime, it is necessary that an accused willfully associate himself in some way with the criminal venture and willfully participates in it as he would in something he wishes to bring about. That is to say that he willfully seeks by some act or omission of his to make a criminal venture succeed. And that is the statutory foundation of the aiding and abetting allegation that you see throughout this indictment.

Now you also will see in this first count the word "intent" and you will see it in other parts of this indictment. Now in that connection, let me tell you what we mean by the word intent, ladies and gentlemen. The series of crimes that are charged in this indictment are serious crimes which require proof of specific intent before either of these defendants can be convicted. Specific intent as the term implies means more than a general intent to commit an act. To establish specific intent the Government must prove that the defendants knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or failure to act is knowingly done if it is done voluntarily and intentionally, and not because of mistake of accident or other innocent reason.

Now ladies and gentlemen, let's talk about 18 USC 2113 which is the bank robbery statute as passed by Congress. This statute, ladies and gentlemen, read in a common sense fashion, makes each and every phase of the robbery of a bank or a savings and loan association —it has to have some federal connection—a crime. In other words you start out from the very beginning and you could have multiple series of crimes, and I'm going to tell you what each series and stage of the crime is. Congress first says in subsection (a) in second paragraph, that whoever enters or attempts to enter any bank with intent to commit in such bank any felony affecting such bank, shall be guilty of an offense against the United States. That's the first stage under this statute. Whoever enters or attempts to enter any bank with intent to commit in such bank any felony affecting such bank shall be guilty of a crime against the United States. So there we are talking about whoever enters or attempts to enter.

Secondly it says, in subsection (a), whoever by force and violence or by intimidation takes from the person or presence of another any money belonging to any bank shall be guilty of a crime against the United States. So there we see that we start out with whoever attempts to enter any bank with the intent to commit a felony, or whoever enters a bank, is guilty of a crime against the United States. It further says, now that we are in the bank, that whoever by force and violence, or by intimidation, takes money belonging to any bank, is guilty of a crime. So there we have in that subsection two different crimes already.

All right. We progress on beyond that. Subsection (c) says that whoever receives, possesses, conceals, stores, barters, sells, or disposes of any money knowing the same to have been taken from the bank in violation of this law, shall be guilty of a crime. This is whoever receives, possesses, conceals, stores, barters, sells, or disposes of any money that is taken in violation of this law,

knowing it to have been taken from a bank, is guilty of a crime. Another crime—a separate crime.

Then in subsection (d) it says whoever in committing or in attempting to commit any offense that I have already defined for you, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be guilty of a crime against the United States. So that's another crime against the United States. So you see, it's like turning on a water hose and the water flows. In this case Congress has by law determined that there are a series of crimes that can be committed—separate crimes—in the course of robbing a bank.

Congress has said that as used in this law the term "bank" means, among other things, any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation. So you ladies and gentlemen must find that the deposits of the named bank were insured by the Federal Deposit Insurance Corporation for this law to even be applicable. That's an essential ingredient of each and every count of this indictment.

Let's talk about some of the terminology that I have given you ladies and gentlemen that is used. Of course the Court has already told you ladies and gentlemen what the word "willfully" means. You will remember that definition.

We have talked about "intent"—we have talked about "knowingly."

The words "to take by intimidation" should be defined for you ladies and gentlemen. To take or attempt to take by intimidation means willfully to take or attempt to take by putting in fear of bodily harm. Such fear must arise from the willful conduct of the accused, rather than from some mere temperamental timidity of the victim. However the fear of the victim need not be so great as to result in terror, panic, or hysteria. The taking or an attempted taking by intimidation must be established by proof of one or more acts or statements of the accused which were done or made in such a manner and under such circumstances as would produce in an ordinary person fear of bodily harm. How-

ever, actual fear need not be proven. Fear, like intent, may be inferred from statements made and acts done or omitted by the accused, and by the victim as well, and from all the surrounding circumstances shown by the evidence in the case.

Now what do we mean by "assault" a person? If you ladies and gentlemen should reach the point that you need to determine whether an assault has been committed then you will need this definition. Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so or any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching or striking or doing bodily harm to the person of another. So a person who has the apparent present ability to inflict bodily harm or injury upon another person, and willfully attempts or even threatens to inflict such bodily harm, as by intentionally flourishing or pointing a pistol or gun at another person, may be found to have assaulted such person.

Now what do we mean to put in jeopardy the life of a person by the use of a dangerous weapon or device? A dangerous weapon or device includes anything capable of being readily operated, manipulated, or otherwise used, to inflict severe bodily harm or injury upon another person. So an operable firearm such as a pistol, revolver, or other gun, capable of firing a bullet or other ammunition, may be found to be a dangerous weapon or device. To put in jeopardy the life of another person by the use of a dangerous weapon or device means to expose such person to a risk of death or to the fear of death by the use of such dangerous weapon or device.

Having defined those various terms, let's go over the counts of this indictment and see what you ladies and gentlemen must find to legally be in position to render a verdict of guilty as to each of these defendants.

I first point out to you ladies and gentlemen that you look at the cases as to each of these defendants separately. We are determining whether or not Billy Sunday Birt did what he is charged with; we are determining

separately whether or not Bobby Gene Gaddis did what he is charged with doing. You've got to look at each person separately. You also look at each one of these counts or charges separately. You've got to look separately as to each person and separately as to each and every count of this indictment.

Let's begin with Count 1 that charges on or about the 6th day of March, 1974. When we talk about the date, legally speaking, the Government is not required to prove that an event happened exactly on the date that is charged in the indictment. It is sufficient to prove that it happened on or about that date.

Secondly it says, in the Middle District of Georgia. You ladies and gentlemen will recall that the Court advised you on Monday morning that Congress had named this court the United States District Court for the Middle District of Georgia. They passed a law that says that. And in doing so you will recall that they determined that 70 of our Georgia counties are within the jurisdiction of this Court. So this means that this happened within one of those 70 counties, and I would charge you that the county in which the National Bank of Walton County and in which Loganville are located, are within the Middle District of Georgia as defined by Congress.

It next says that Billy Wayne Davis, Billy Sunday Birt and Bobby Gene Gaddis, aided and abetted by each other, did enter this bank with the intent to commit in such bank a felony affecting such bank—that is the taking by force and violence and by intimidation from the presence of the employees of such bank, money belonging to and in the care, custody, control, management and possession of this bank.

Of course you must find in this case that Billy Sunday Birt and Bobby Gene Gaddis, in accordance with—that they either actively went in the bank or that they either willfully participated in the manner defined under this aiding and abetting statute that the Court has already told you about. That they did in some capacity enter this bank, and its deposits were insured by the Federal Deposit Insurance Corporation, and that when they en-

tered that bank it was with the intent to commit in the bank a felony, and the robbery—of course if you enter with the intent to rob the bank then that would be, since robbery is a felony, an intent to commit a felony.

So we've got to establish the date, got to establish the participation as defined by each of these defendants, that they did enter this bank, that its deposits were insured by the Federal Deposit Insurance Corporation, and that the entry by them was with the intent to commit in that bank a felony and the indictment tells you what the felony is. You must find those ingredients to find each of these defendants guilty on Count 1.

Count 2 says—you've got the same date situation, the same Middle District, the same people, that by force and violence and by intimidation—you've got to find that there was force and violence and intimidation—did take from the person and presence of Zalia Smith and Jenny Brooks, about $7,441 in money that belonged to and was in the care and custody, etc., of this bank, whose deposits were insured by the Federal Deposit Insurance Corporation. So you have to find that it happened on or about that date, that they participated in it, or aided and abetted each other, that by force and violence and by intimidation that there was a taking from the person and presence of these two bank employees of about this amount of money. Now the exact amount of money, ladies and gentlemen, is not necessary to be proved. It just has to be a substantial sum of money, about the amount alleged in the indictment. You've got to find that that money belonged to or was in the care, custody, control, management and possession of this bank, and that its deposits were insured by the Federal Deposit Insurance Corporation.

All right, we proceed on to Count 3. In this count, ladies and gentlemen, it charges that these defendants did possess this money which had been taken and carried away with the intent to steal from this bank whose deposits were insured by the Federal Deposit Insurance Corporation, and that at the time they knew said money to have been so taken and carried away. Now what do we mean by possess? The law recognizes two kinds of

possession—actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. I am in actual possession of this pencil, you ladies and gentlemen are in actual possession of the pencils you hold and the papers that you hold. You have it—actually have it. On the other hand, a person who although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons is then in constructive possession of it. If you ladies and gentlemen wore a coat this morning, which is very doubtful, but if you had worn a coat and left it back in the jury room, it's still your coat, and you have the intention when you leave to go back there and get it and take it with you. You are in constructive possession of it. My automobile is parked behind the building. I have the keys in my pocket. I intend to go out there and drive it off. I'm in constructive possession of it. I lay a pencil down, and I intend at sometime to use it, and though it is not in my hand I constructively possess it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, the possession is sole. If two or more persons share actual or constructive possession, possession is joint.

So that is Count 3. And you've got to find exactly what's set forth in that count to find guilt on the part of each of these defendants.

Then Count 4 says that on or about the 6th day of March in the same place these same people, aided and abetted by each other by force and violence and by intimidation did take from the person and presence of these same people about the same amount of money belonging to and in the care, custody and control of this bank, insured by the Federal Deposit Insurance Corporation. And it further says, and these defendants, aided and abetted by each other, in committing the aforesaid offense did assault one William Remo Cody, and did put in jeopardy the life of said William Remo Cody by means

and use of a dangerous weapon, that is a .30 caliber rifle, all in violation of the laws that the Court has told you about.

So it is, ladies and gentlemen that you will have to begin remembering that we are going one step further down the road in charging the commission of a crime. You've got to find the date, the participation by each defendant, that by force and violence and by intimidation there was a taking from the person and presence of the named people about this amount of money that belonged to or was in the care, custody and control of this bank insured by the FDIC, and then you've got to further find that these individuals, aided and abetted by each other, in committing this as charged, did assault one William Remo Cody, and did put in jeopardy Mr. Cody's life, by means and use of a dangerous weapon, that is a .30 caliber rifle. You must find all of that for that to be a violation of the law.

Count 5 charges substantially the same thing except that it says that Mr. Cody's life was put in jeopardy by means and use of a different dangerous weapon, that is a .20 gauge shotgun. You must find the same thing except in this case by means of a .20 gauge shotgun.

Thirdly, it says essentially the same thing except that in committing the aforesaid offense that these defendants did assault one Zalia Smith, and put in jeopardy her life by means and use of a dangerous weapon, a .38 caliber revolver. You will have to find that Zalia Smith was assaulted and that her life was put in jeopardy by means and use of this dangerous weapon, to find guilt as to that count of the indictment.

Then Count 7 is essentially the same thing except that it says that in committing this offense these individuals did assault one Jenny Brooks, and did put in jeopardy her life by means and use of a dangerous weapon, a .38 caliber revolver. You must find the same thing except as to Jenny Brooks and except as to that weapon, in Count 7.

Then Count 8 charges essentially the same thing except that it says that in committing this offense that these defendants did assault one Faye Jackson, and put in

jeopardy her life by means and use of a dangerous weapon, that is a .45 caliber pistol. You must find those ingredients, ladies and gentlemen, for there to be a finding of guilt on that count of this indictment.

I believe, ladies and gentlemen, that that covers the principles of law as I presently see them as they are applicable to this case except as to the form of your verdict and as to the procedure that you should use in arriving at your verdict.

Attached to this indictment is a form of verdict that has been prepared for your use. It's the last thing on the back of the indictment. Now when you ladies and gentlemen go to your jury room, and at that time only the twelve jurors who were first selected will go—the alternates will be then separated—the first thing that you ladies and gentlemen will do is to elect a foreman or a forelady. You do that by a majority vote. But after you do that by a majority vote, thereafter you make all of your decisions by the unanimous action of all twelve jurors. You take up every count of this indictment as to each of these defendants, arriving at a verdict as to each count and as to each defendant. That verdict, of course, will be guilty or not guilty, as to each defendant and as to each count.

Let your foreman enter the words "guilty" or "not guilty" in the blank spaces that are provided. It says, "We the jury find the defendant Billy Sunday Birt ———— on Count 1, ———— on Count 2" and there's a blank on every count of the indictment. Enter the words there. Do the same as to Bobby Gene Gaddis on each count. Insert the date, let your foreman sign where it says "foreman." So that the Court will have evidence that this is the verdict of all twelve jurors, then let the other eleven jurors sign where is says "We concur." There are eleven other spaces. When we get through we have the foreman and the other eleven jurors' signatures at the botton of the verdict. And then return your verdict into Court.

I do not anticipate, ladies and gentlemen, that it will be necessary that you ladies and gentlemen ask any questions of the Court during your deliberations. If

that anticipation is unfounded and you want to ask a question you may write it on a piece of paper and hand it to the Marshal and he will bring it to me and I will respond in an appropriate manner.

I caution you that if you wish to do that, do not write on there "Judge, we are hung up 11 to 1, 6 to 6, or 9 to 3, and we want you to answer this question." How you then stand is your business and your business alone—that is how you are divided numerically. You should not disclose your division if there be division, to anybody—be it the Marshal or the Judge or anybody else. That is purely your private business. So please do not do that even if you choose to write a question the Court.

In a few minutes I'm going to let the lawyers suggest to me what I may have failed to tell you ladies and gentlemen, or may have told you incorrectly. If necessary, I will bring you back and correct or add to. If not, the Marshal will bring you the evidence, the indictment and the form of the verdict with the Court's instructions to begin your deliberations. But before the Marshal takes you to your jury room, let me remind you, ladies and gentlemen, that you have been chosen and sworn as jurors to try the issues of fact in this case. You are to perform your duty without bias or prejudice as to any party. Our system of law, ladies and gentlemen, does not permit jurors to be governed by prejudice, public opinion, or sympathy. Both the parties and the public expect that every juror on every jury will carefully and impartially consider all of the evidence in every case and follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

We appreciate your attention throughout this trial, and at this time the Marshal will take you ladies and gentlemen to your jury room.

(Alternates are instructed to wait outside the jury room.)

JURY REMOVED FROM COURTROOM.

THE COURT: Any corrections or additions for the Government?

MR. CARSON: None, Your Honor.

THE COURT: For the defendants?

MR. MANN: None on the part of Defendant Gaddis, Your Honor.

MR. WILCOX: None on the part of defendant Birt, Your Honor.

THE COURT: All right. Let the jury begin its deliberations. The Court will take a short recess.

10:00 A.M., May 15, 1974.

VERDICT OF THE JURY

4:08 P.M., May 15, 1974.

THE COURT: Madam Foreman, have you arrived at a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: Would you deliver it to the Marshal who will deliver it to the Clerk and if it is in proper form he will publish it.

THE CLERK: It's in proper form, Your Honor. United States of America vs. Billy Sunday Birt and Bobby Gene Gaddis, Criminal No. 74-3, Athens Division, "We, the jury, find the defendant Billy Sunday Birt guilty on Count 1, guilty on Count 2, guilty on Count 3, guilty on Count 4, guilty on Count 5, guilty on Count 6, guilty on Count 7, guilty on Count 8. We the jury find the defendant Bobby Gene Gaddis guilty on Count 1, guilty on Count 2, guilty on Count 3, guilty on Count 4, guilty on Count 5, guilty on Count 6, guilty on Count 7, guilty on Count 8. This 15th day of May, 1974, Delores Lindsay, Foreman. We concur," signed by the eleven other jurors.

THE COURT: Is there anything to come before the Court before the jury is discharged, gentlemen?

MR. MANN: No, Your Honor.

MR. WILCOX: No, Your Honor.

JURY DISMISSED.

SENTENCING

5:15 P.M., May 15, 1974.

THE COURT: All right, gentlemen, before we begin, the Court is required to advise each of you on account of the fact that you entered a plea of not guilty and then were convicted by a jury, that you have a right to appeal the verdict of the jury and the sentence imposed by the Court, and you may do that by instructing your Court-appointed counsel to file that notice of appeal for you. There responsibility, for your information, under the practice of this Court, continue through the appeal process. You may also instruct the Clerk of this Court to file a notice of appeal, and either one of them will file it. And you have, as to doing that, ten days from today—not counting today—within which time for that to be done.

That having been accomplished the Court will be pleased to hear from all of you gentlemen, the lawyers and the defendants as to the question what sentence should be imposed.

MR. MANN: Your Honor, of course there is nothing we can say about the trial. We entered our plea of not guilty and of course the jury has returned a verdict finding Mr. Gaddis guilty.

Your Honor, of course, has Mr. Gaddis' probation report. He does not have a conviction of any crime. I am sure that Your Honor is aware that he has been charged in several instances with crimes, however he has not until this day been convicted of any crimes.

Mr. Gaddis is 34 years old. As I recall he has been married to his present wife since he was very young—15, and I think she was 18. They have four children, ranging in age as I recall from somewhere around 16 down to 3, my best recollection.

The only thing I can ask the Court is that since this is his first conviction of any crime, I would ask the Court to be as lenient as possible.

I think Mr. Gaddis does have something to say.

DEFENDANT GADDIS: Judge, I ask you to be just as lenient on me as you could. God knows I am not guilty.

THE COURT: Mr. Wilcox?

MR. WILCOX: Your Honor, I would like to repeat again—it was mentioned in the trial, but Mr. Birt is also married, five children, they've been here throughout his trial. We asked for a trial by jury, that jury has returned a verdict, and we appear before you today ready for the sentence of the Court.

THE COURT: Mr. Birt?

DEFENDANT BIRT: Nothing to say.

THE COURT: Gentlemen, of course the hardest job that any Judge has is to sentence anybody. We have to decide questions of guilt or innocence. That's been decided in the case. Frankly, the Court could not argue with the verdict of the jury. We are not here to do that even if the Court could.

The Court would not be doing its duty if the Court were to in any way excuse what is obviously one of the most serious bank robberies that we've had, probably that we can ever have, where not only weapons were used by the life of a policeman is seriously endangered. And the Court in this case, even though it is familiar with the previous difficulties—I don't remember in particular what they are—those that came out on the trial, is not taking any of those into consideration. The Court is looking purely at this offense, what occurred, for which these gentlemen are found guilty by the verdict of this jury.

That being the case, the Court, as to each of the Counts for which these gentlemen were found guilty, to run concurrently, sentences each of these defendants to the custody of the Attorney General for twenty-five years.

That is the sentence of the Court.

Mr. Mann and Mr. Wilcox, the Court realizes that twenty-five years is the maximum, and the cases say that there is a merger of all of those offenses. If there is any question as the legality of that sentence, that's the Court's intention. We can get it straight on that.

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SUPREME COURT OF THE UNITED STATES

No. 74-1141

UNITED STATES, PETITIONER,

v.

BOBBY GENE GADDIS and BILLY SUNDAY BIRT

ORDER ALLOWING CERTIORARI. Filed May 27, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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